



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT
2000 FORT POINT ROAD
GALVESTON, TEXAS 77550

CESWG - Central

26 March 2026

MEMORANDUM FOR RECORD

SUBJECT: US Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023),¹ SWG-2025-00174²

BACKGROUND. An Approved Jurisdictional Determination (AJD) is a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel. AJDs are clearly designated appealable actions and will include a basis of JD with the document.³ AJDs are case-specific and are typically made in response to a request. AJDs are valid for a period of five years unless new information warrants revision of the determination before the expiration date or a District Engineer has identified, after public notice and comment, that specific geographic areas with rapidly changing environmental conditions merit re-verification on a more frequent basis.⁴ For the purposes of this AJD, we have relied on section 10 of the Rivers and Harbors Act of 1899 (RHA),⁵ the Clean Water Act (CWA) implementing regulations published by the Department of the Army in 1986 and amended in 1993 (references 2.a. and 2.b. respectively), the 2008 *Rapanos-Carabell* guidance (reference 2.c.), and other applicable guidance, relevant case law and longstanding practice, (collectively the pre-2015 regulatory regime), and the *Sackett* decision (reference 2.d.) in evaluating jurisdiction.

This Memorandum for Record (MFR) constitutes the basis of jurisdiction for a Corps AJD as defined in 33 CFR §331.2. The features addressed in this AJD were evaluated consistent with the definition of “waters of the United States” found in the pre-2015 regulatory regime and consistent with the Supreme Court’s decision in *Sackett*. This AJD did not rely on the 2023 “Revised Definition of ‘Waters of the United States,’” as

¹ While the Supreme Court’s decision in *Sackett* had no effect on some categories of waters covered under the CWA, and no effect on any waters covered under RHA, all categories are included in this Memorandum for Record for efficiency.

² When documenting aquatic resources within the review area that are jurisdictional under the Clean Water Act (CWA), use an additional MFR and group the aquatic resources on each MFR based on the TNW, interstate water, or territorial seas that they are connected to. Be sure to provide an identifier to indicate when there are multiple MFRs associated with a single AJD request (i.e., number them 1, 2, 3, etc.).

³ 33 CFR 331.2.

⁴ Regulatory Guidance Letter 05-02.

⁵ USACE has authority under both Section 9 and Section 10 of the Rivers and Harbors Act of 1899 but for convenience, in this MFR, jurisdiction under RHA will be referred to as Section 10.

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amended on 8 September 2023 (Amended 2023 Rule) because, as of the date of this decision, the Amended 2023 Rule is not applicable Texas due to litigation.

1. SUMMARY OF CONCLUSIONS.

- a. Provide a list of each individual feature within the review area and the jurisdictional status of each one (i.e., identify whether each feature is/is not a water of the United States and/or a navigable water of the United States).

Name	Type	Size (acres)	Location		Jurisdictional Status
			Latitude	Longitude	
Gulf Intercoastal Waterway	GIWW A TNW	0.26	28.92854	-95.335706	RPW, jurisdictional
Wetland 1	Wetland PSS	.38	28.929572	-95.332128	Non-adjacent to non-RPW, non-jurisdictional
Wetland 2	Wetland PEM	1.2	28.930139	-95.333524	Non-adjacent to non-RPW, non-jurisdictional
Wetland 3	Wetland PEM	0.05	28.930641	-95.334788	Non-RPW, non-jurisdictional
Wetland 4	Wetland PEM	1.20	28.928207	-95.332293	Non-RPW, non-jurisdictional
Wetland 5	Wetland PSS	41.68	28.927364	-95.340187	Non-RPW, non-jurisdictional
Wetland 6	Wetland PEM	0.27	28.929600	-95.335035	Non-RPW, non-jurisdictional
Wetland 7	Wetland PSS	0.06	28.929529	-95.335807	Non-RPW, non-jurisdictional
Wetland 8	Wetland PSS	2.56	28.927701	-95.339046	Non-RPW, non-jurisdictional
Wetland 9	Wetland PEM	0.93	28.927101	-95.343910	Adjacent, jurisdictional
Man-Made Ditch	Ditch	540 Linear Feet	28.928053	-95.334372	Non-RPW, non-jurisdictional

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2. REFERENCES.

- a. Final Rule for Regulatory Programs of the Corps of Engineers, 51 FR 41206 (November 13, 1986).
 - b. Clean Water Act Regulatory Programs, 58 FR 45008 (August 25, 1993).
 - c. U.S. EPA & U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (December 2, 2008)
 - d. *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023)
 - e. 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act.
3. REVIEW AREA. Approximate 166.80-acre property located at the Port of Freeport (parcels 27 & 34) on Farm-to-Market (FM) 1495 and Levee Road, located in Freeport, Brazoria County, Texas. Specifically, the project site is located at Latitude 29.9293574°, Longitude -95.334108°.
 4. NEAREST TRADITIONAL NAVIGABLE WATER (TNW), INTERSTATE WATER, OR THE TERRITORIAL SEAS TO WHICH THE AQUATIC RESOURCE IS CONNECTED. Gulf Intercoastal Waterway.
 5. FLOWPATH FROM THE SUBJECT AQUATIC RESOURCES TO A TNW, INTERSTATE WATER, OR THE TERRITORIAL SEAS. Wetland 9 abuts tidally influenced wetlands abutting Bryan Lake, a TNW (1972 Galveston District Navigable Waters List). Wetland 9 is connected via a culvert under FM 1495 as seen during the site visit. The flow path continues via abutting wetlands 3434 linear feet across Bryan Lake, a TNW and 4250 linear feet out Bryan Cut, a TNW ending at Gulf Intercoastal Waterway, a TNW.

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6. SECTION 10 JURISDICTIONAL WATERS⁶: Describe aquatic resources or other features within the review area determined to be jurisdictional in accordance with Section 10 of the Rivers and Harbors Act of 1899. Include the size of each aquatic resource or other feature within the review area and how it was determined to be jurisdictional in accordance with Section 10.⁷ N/A
7. SECTION 404 JURISDICTIONAL WATERS: Describe the aquatic resources within the review area that were found to meet the definition of waters of the United States in accordance with the pre-2015 regulatory regime and consistent with the Supreme Court's decision in *Sackett*. List each aquatic resource separately, by name, consistent with the naming convention used in section 1, above. Include a rationale for each aquatic resource, supporting that the aquatic resource meets the relevant category of "waters of the United States" in the pre-2015 regulatory regime. The rationale should also include a written description of, or reference to a map in the administrative record that shows, the lateral limits of jurisdiction for each aquatic resource, including how that limit was determined, and incorporate relevant references used. Include the size of each aquatic resource in acres or linear feet and attach and reference related figures as needed.
 - a. TNWs (a)(1): (0.26 acre) LiDAR, topo, aerial imagery, site visit, and applicant-provided wetland delineation reports were utilized as part of the desktop analysis to identify that the Gulf Intercoastal Waterway is subject to daily ebb and flow of the tide, a Traditionally Navigable Water (TNW).
 - b. Interstate Waters (a)(2): N/A
 - c. Other Waters (a)(3): N/A
 - d. Impoundments (a)(4): N/A
 - e. Tributaries (a)(5): N/A
 - f. The territorial seas (a)(6): N/A

⁶ 33 CFR 329.9(a) A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce or is presently incapable of such use because of changed conditions or the presence of obstructions.

⁷ This MFR is not to be used to make a report of findings to support a determination that the water is a navigable water of the United States. The district must follow the procedures outlined in 33 CFR part 329.14 to make a determination that water is a navigable water of the United States subject to Section 10 of the RHA.

- g. Adjacent wetlands (a)(7): Wet 9 - (0.93 acre) LiDAR, TOPOP, aerial imagery, site visit, and applicant-provided wetland delineation report were utilized as part of the desktop analysis to identify that Wetland 9 is immediately adjacent to and has a continuous surface connection with the tidal waters of the Gulf Intercoastal Waterway, a TNW. Photos 1-2 shows culvert is holding water on both sides, and the culvert is providing a continuous surface connection between both Wet 9 and tidal abutting wetlands subject to the daily ebb and flow of the tide from Bryan Lake (TNW).

8. NON-JURISDICTIONAL AQUATIC RESOURCES AND FEATURES

- a. Describe aquatic resources and other features within the review area identified as “generally non-jurisdictional” in the preamble to the 1986 regulations (referred to as “preamble waters”).⁸ Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA as a preamble water. N/A
- b. Describe aquatic resources and features within the review area identified as “generally not jurisdictional” in the *Rapanos* guidance. Include size of the aquatic resource or feature within the review area and describe how it was determined to be non-jurisdictional under the CWA based on the criteria listed in the guidance.
Man-Made Ditch (540 Linear Feet):
The ditch only flows in response to precipitation events and does not have relatively permanent flow as evident in Google Earth aerial images, and LiDAR. The ditch does not have defined bed or bank and or ordinary high-water mark. Man-Made Ditch is not a water of the United States subject to Section 404 of the Clean Water Act. Any discharge of dredged and or fill material into the Man-Made Ditch does not require a Department of the Army Permit.
- c. Describe aquatic resources and features identified within the review area as waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA. Include the size of the waste treatment system within the review area and describe how it was determined to be a waste treatment system N/A
- d. Describe aquatic resources and features within the review area determined to be prior converted cropland in accordance with the 1993 regulations (reference 2.b.). Include the size of the aquatic resource or feature within the review area and describe how it was determined to be prior converted cropland. N/A

⁸ 51 FR 41217, November 13, 1986.

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- e. Describe aquatic resources (i.e. lakes and ponds) within the review area, which do not have a nexus to interstate or foreign commerce, and prior to the January 2001 Supreme Court decision in “SWANCC,” would have been jurisdictional based solely on the “Migratory Bird Rule.” Include the size of the aquatic resource or feature, and how it was determined to be an “isolated water” in accordance with SWANCC. N/A
- f. Describe aquatic resources and features within the review area that were determined to be non-jurisdictional because they do not meet one or more categories of waters of the United States under the pre-2015 regulatory regime consistent with the Supreme Court’s decision in *Sackett* (e.g., tributaries that are non-relatively permanent waters; non-tidal wetlands that do not have a continuous surface connection to a jurisdictional water).

Wetland 1-8, (47.44 acres total): non-adjacent wetland does not abut a RPW and/or a TNW.

Based on data sources listed in #9, our site visit on 28 October 2025, and desk reviews on 2 October 2025, 29 January 2026, we have determined these wetlands reside in depressional areas within the review area, that collects rainwater and is completely enclosed by elevated uplands. Photos 3-4 show that the ditch from Wet 5 does not provide a continuous surface connection with the Gulf Intercoastal Waterway. Based on our review, the wetlands do not have any known continuous surface connection to any RPW, TNW, or impoundments of either. Therefore, in accordance with the pre-2015 regime post-Sackett and the 12 March 2025 Memorandum to the Field Between the U.S. Department of Army, U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency Concerning the Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act, Wet 1-8 do not meet the definition of adjacent as defined in the pre-2015 regime post Sackett guidance and are not waters of the United States subject to Section 404 of the Clean Water Act. Any discharge of dredged and/or fill material into Wet 1-8 does not require a Department of the Army permit.

9. DATA SOURCES. List sources of data/information used in making determination. Include titles and dates of sources used and ensure that information referenced is available in the administrative record.
 - a. Delineation, maps, and data sheets prepared by Berg Oliver Environmental Updated 17 February 2026.

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- b. Desk Review 2 October 2025 and 29 January 2026
- c. Site Visit: 28 October 2025
- d. Aerial Photos: Google Earth Aerial Imagery Berg Oliver Environmental Report
- e. United States Department of Interior (DOI), Fish and Wildlife Service (FWS), National Wetland Inventory (NWI); Accessed
- f. United States Geological Survey (USGS) Topographic (Topo) map Berg Oliver Environmental Report
- g. USACE Texas Regulatory Viewer 3 DEP Digital Elevation Model (DEM) Accessed

10. OTHER SUPPORTING INFORMATION. N/A

11. NOTE: The structure and format of this MFR were developed in coordination with the EPA and Department of the Army. The MFR's structure and format may be subject to future modification or may be rescinded as needed to implement additional guidance from the agencies; however, the approved jurisdictional determination described herein is a final agency action.

PREPARED BY:



Shawn Hillen
Regulatory Specialist

Date: 26 March 2026

REVIEWED/APPROVED BY:



Kara Vick Clark
Team Lead, South Branch
Regulatory Division, Galveston District

Date: 26 March 2026

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Exhibit

Path: S:\Sectors\Environmental\BOA_Filing_Master\Projects\137xx\13706--Port_Freepor..._2344a\Graphics\NRC\gis\Master_P\013706_new.aprx



Legend		Acres
	Adjacent Wetlands (Jurisdictional ¹)	0.93
	Isolated Wetlands (Non-Jurisdictional ¹)	47.44
	Waters of the U.S. (Jurisdictional ¹)	0.26
	Man-made Ditch (Non-Jurisdictional ¹)	540 LF
	Sample Points	
	Transects	
	Project Boundary	166

FIGURE 11 - AQUATIC RESOURCES DETERMINATION AND CLASSIFICATION

Project #: BO5050-13706.ES
For: Port of Freeport
Location: SE of FM 1495 and Levee Road
 Brazoria County, Texas

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Disclaimer: Potential features depicted have been classified based upon Berg Oliver Associates' professional opinion. The Corps of Engineers is the final authority on jurisdictional features.

EVALUATION	
DATE:	2/26/2026
REVISIONS	